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Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh

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COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-02-1392–08 OF 2014
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
26 APRIL 2017

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Civil Procedure — Appeal — Cross-appeal — Appellant appealed against decision of High Court rejecting his defences and holding him liable to pay damages to respondent for defamation — Respondent filed notice of cross-appeal against trial court's dismissal of his claim for exemplary damages and its ruling that there was no malice on appellant's part — Respondent filed notice of cross-appeal against trial court's dismissal of his claim for exemplary damages and its ruling that there was no malice on appellant's part — Whether there could be a cross-appeal on a matter not raised by original appellant in his appeal — Whether notice of cross-appeal was incompetent and had to be struck out — Whether respondent should filed separate notice of appeal against trial court's decisions on exemplary damages issue and malice issue as they were substantive rulings made against respondent on his failure to prove them

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Tort — Defamation — Libel — Appellant disowned liability for defamatory article published in newspaper because article did not contain exact statement he had given the reporter — Reporter admitted article was edited version of appellant's original statement — Appellant accepted article as published without seeking to have it corrected — Whether law presumed statements in article attributed to appellant were made by him

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The respondent, a former Chief Minister of Sabah, sued the appellant, a surgeon and politician, for libeling him in a Sabah newspaper article by alleging that he was involved in the fraudulent issuance of national registration identity cards to undeserving foreigners in Sabah. The respondent pleaded that the appellant had defamed him out of malice. The High Court, after considering and rejecting the defences of justification, qualified privilege and fair comment, found for the respondent and awarded him RM100,000 in general and aggravated damages. The court ruled that there was no malice on the appellant's part and dismissed the claim for exemplary damages. At the trial, the appellant contended, inter alia, that he could not be held responsible for the article as published because it was not the exact version of what he had given to the newspaper's reporter. The reporter, DW4, agreed with that contention at the trial but, under cross-examination, also agreed that the appellant had never disputed the article as published or sought for any correction or amendment to be made. In response to the appellant's filing of the instant appeal against the

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High Court's decision, the respondent filed a notice of cross-appeal against the dismissal of his claim for exemplary damages and the finding that there was no malice on the appellant's part. At the appeal hearing, the appellant raised a preliminary objection that the notice of cross-appeal was incompetent and had to be struck out.

Held, upholding the preliminary objection and striking out the notice of cross-appeal and dismissing the appellant's appeal:

(1) There was no proper and competent appeal by the respondent against the issues of exemplary damages and malice. In respect of both those issues, the burden of proof was on the respondent. The denial of the prayer for exemplary damages and the ruling that there was no malice on the appellant's part were substantive rulings made against the respondent by the trial court. Therefore, if the respondent was aggrieved by those decisions, he should have filed a separate notice of appeal. With regard to both those issues, there was no appeal by the appellant for obvious reason. Hence, those issues were never intended to be in play within the purview of the appellant's notice of appeal. An appeal which did not affect the original appellant could not be by way of a cross-appeal. The respondent should have filed a separate notice of appeal against what he regarded to be rulings that were adverse to him (see paras 19 & 21–22).

(2) The court agreed with the trial judge that it was not open to the appellant to now deny responsibility for the consequences that flowed from the publication of the article in the *Daily Express*. The appellant had more than ample opportunity to contact DW4 to alert him to any incorrect contents in the published article but he failed to do so. The law therefore presumed that the appellant had embraced the article in all its contents to be entirely his and that it was his publication in as much as it was published by DW4 in the *Daily Express*. If the appellant had any concern or reservations about the article, he was duty-bound to contact DW4 and have him make the necessary corrections to the article. This he did not do. He could not now conveniently disown the published article although it was not in its original form and content (see paras 32 & 37).

(3) The trial court's global award of RM100,000 for general and aggravated damages was not excessive or unreasonable bearing in mind, among others, the reputation of the respondent among the local community. The figure was fair and just compensation in the circumstances of the case. It was also within the range of damages looking at the trend on the awarding of such damages in like cases (see para 69).

(4) There was no cause for appellate interference in the instant case. The trial court was not plainly wrong nor did it commit any appealable error in deciding the way it did. The article contained a defamatory meaning against the respondent; there was no valid reason to depart from the trial

court's findings that the defences sought to be erected by the appellant were devoid of merits; and there was also no cogent reason to disturb the award of damages which was reasonable and fair in the circumstances (see para 70).

[Bahasa Malaysia summary

Responden, mantan Ketua Menteri Sabah, menyaman perayu, pakar bedah dan ahli politik, kerana memfitnahnya di dalam artikel surat khabar dengan mendakwa bahawa dia terlibat dalam pengeluaran palsu kad pengenalan pendaftaran negara kepada orang-orang asing yang tidak patut di Sabah. Responden merayu bahawa perayu telah memfitnahnya kerana berniat jahat. Mahkamah Tinggi, selepas mempertimbangkan dan menolak pembelaan-pembelaan justifikasi, pelindungan bersyarat dan komen adil, mendapati memihak responden dan mengawardnya sebanyak RM100,000 ganti rugi am dan tambahan. Mahkamah memutuskan bahawa tidak terdapat niat jahat oleh pihak perayu dan menolak tuntutan untuk ganti rugi teladan. Semasa perbicaraan, perayu berhujah, antara lain, bahawa dia tidak boleh dipersalahkan untuk artikel yang diterbitkan kerana ia bukan versi yang sama dengan apa yang dia berikan kepada wartawan surat khabar. Wartawan, DW4 yang bersetuju dengan hujahan tersebut semasa perbicaraan tetapi, semasa pemeriksaan balas, juga bersetuju bahawa perayu tidak pernah pertikaikan artikel seperti diterbitkan atau memohon untuk apa-apa pembetulan atau pindaan untuk dibuat. Dalam menjawab kepada rayuan ini yang difailkan oleh perayu terhadap keputusan Mahkamah Tinggi, responden memfailkan notis rayuan balas terhadap penolakan tuntutannya untuk ganti rugi teladan dan keputusan bahawa tidak terdapat niat jahat oleh pihak perayu. Pada pendengaran rayuan, perayu membangkitkaan bantahan awalan bahawa notis rayuan balas adalah tidak kompeten dan patut dibatalkan.

Diputuskan, mengesahkan bantahan awalan dan membatalkan notis rayuan balas dan menolak rayuan perayu:

(1) Tidak terdapat rayuan yang betul dan kompeten oleh responden terhadap isu-isu ganti rugi teladan dan niat jahat. Berkenaan kedua-dua isu tersebut, beban pembuktian adalah ke atas responden. Penafian permohonan untuk ganti rugi teladan dan keputusan bahawa tidak terdapat niat jahat oleh pihak perayu adalah keputusan substantif yang dibuat terhadap responden oleh mahkamah perbicaraan. Oleh itu, jika responden tidak puas hati dengan keputusan tersebut, dia patut memfailkan notis rayuan berasingan. Berkaitan kedua-dua isu tersebut, tidak terdapat rayuan oleh perayu untuk alasan yang jelas. Maka, isu-isu tersebut tidak pernah diniatkan untuk menjadi peranan dalam lingkungan notis rayuan perayu. Rayuan yang mana tidak menjejaskan perayu asal tidak boleh melalui rayuan balas. Responden sepatutnya memfailkan notis rayuan berasingan terhadap apa yang dia anggap

sebagai keputusan yang bertentangan terhadapnya (lihat perenggan 19 & 21–22).

(2) Mahkamah bersetuju dengan hakim perbicaraan bahawa ia tidak terbuka kepada perayu untuk sekarang menafikan tanggungjawab untuk akibat daripada penerbitan artikel tersebut di dalam *Daily Express*. Perayu telah mempunyai peluang yang banyak untuk menghubungi DW4 untuk memberitahunya kepada apa-apa isi kandungan yang tidak betul di dalam artikel yang diterbitkan tetapi dia gagal berbuat sedemikian. Undang-undang oleh itu menganggap bahawa perayu telah menerima artikel dan kesemua isi kandungannya menjadi haknya secara keseluruhan dan bahawa penerbitannya setakat yang diterbitkan oleh DW4 di dalam *Daily Express*. Jika perayu mempunyai apa-apa kebimbangan atau keberatan mengenai artikel tersebut, dia bertanggungjawab untuk menghubungi DW4 dan menyuruh dia membuat apa-apa pembetulan kepada artikel tersebut. Ini tidak dibuatnya. Dia tidak dapat sekarang untuk dengan mudah menyangkal artikel yang diterbitkan walaupun ia bukan di dalam bentuk dan kandungan asalnya (lihat perenggan 32 & 37).

(3) Global award mahkamah perbicaraan sebanyak RM100,000 bagi ganti rugi tambahan tidak berlebihan mengambil kira, antara lain, reputasi responden dikalangan komuniti tempatan. Angka tersebut adalah pampasan adil dan wajar dalam keadaan kes. Ia juga dalam jurang ganti rugi melihat trend dalam mengaward ganti rugi sedemikian dalam kes serupa (lihat perenggan 69).

(4) Tidak terdapat sebab untuk campur tangan mahkamah rayuan di dalam kes ini. Mahkamah perbicaraan jelas tidak salah ataupun ia melakukan apa-apa kesilapan dalam memutuskan cara mana ia buat. Artikel mengandungi maksud fitnah terhadap responden; tidak terdapat sebab sah untuk menyimpang daripada dapatan mahkamah perbicaraan bahawa pembelaan-pembelaan yang dipohon untuk ditegakkan oleh perayu tidak mempunyai merit; dan juga tidak terdapat sebab jelas untuk menganggu award ganti rugi yang mana adalah munasabah dan adil dalam keadaan (lihat perenggan 70).]

Notes

For cases on cross-appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1156–1160.

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Cavender's Trust, Re [1881] 16 Ch D 270, CA (refd)

Chiew Foo Hua v The Publisher Miri Daily News & Anor [2000] MLJU 664; [2000] 8 CLJ 68, HC (refd)

A *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22; [2000] 6 CLJ 433, HC (refd)
Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242; [2014] 3 CLJ 560, CA (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd [2016] 5 MLJ 557;
B [2016] 8 CLJ 149, FC (folld)
Lange v Australian Broadcasting Corp [1997] 145 ALR 96, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (folld)
Lucas-Box v News Group Newspapers Ltd [1986] 1 All ER 177, CA (refd)
C *Polly Peck (Holdings) plc and others v Trelford and others* [1986] 2 All ER 84, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Syed Husin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
D *Viscount De L'Isle v Times Newspapers Ltd* [1987] 3 All ER 499, CA (refd)

Legislation referred to

Defamation Act 1957 s 8
Internal Security Act 1960 (repealed by Security Offences (Special Measures)
E Act 2012)
Rules of the Court of Appeal 1994 rr 5, 8

Appeal from: Civil Suit No BKI-22–90/5 of 2012 (High Court, Kota Kinabalu)

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Marina Tiu (Yap Chin & Tiu) for the appellant.
Chung Jiun Dau (Sonny Durai with him) (Allion Kitingan & Partners) for the respondent.

G **Abang Iskandar JCA (delivering judgment of the court):**

BACKGROUND OF THE CASE

[1] Tan Sri Harris bin Mohd Salleh ('the plaintiff') is a former Chief
H Minister of Sabah and is presently a businessman who sits on the boards of directors of several companies. Dr Chong Eng Leong ('the defendant') is a surgeon and a politician.

[2] This case was concerned with a claim for defamation arising from the
I publication of an article in a Sabah local newspaper. The plaintiff alleged that the defendant had committed the tort of libel against him.

[3] In *Daily Express* newspaper issue dated 17 July 2011 which was published on Sunday, the defendant had caused to be published the heading 'Harris

should clear his name' ('the impugned article') the words which the plaintiff claimed to be defamatory. A

[4] In the impugned article, it was stated by the defendant:

> A political activist said former Chief Minister Tan Sri Harris Salleh has been implicated in the book by MD Mutalib entitled 'IC Projek- Agenda Tersembunyi Mahathir?'. B

[5] The defendant claimed that the book reproduced a letter to the author from one Hassnar Ibrahim, who was detained under the Internal Security Act 1960 ('the ISA') for his involvement in the issuance of fraudulent identity cards ('ICs'), describing how the plaintiff was involved in the fraudulent issuance of blue ICs to foreigners and the purpose of such exercise. C

[6] The plaintiff complained in this suit that the impugned article was defamatory of him. His name was mentioned six times in the said article. He pleaded that in their natural and ordinary meaning, the words contained in the impugned article meant the following: D

(a) that the plaintiff has committed a very serious crime of treason punishable by death; E

(b) the plaintiff is involved in fraudulent acts;

(c) the plaintiff is involved in the issuance of illegal ICs to foreigners in Sabah; F

(d) the plaintiff is a traitor to the country;

(e) the plaintiff is a disloyal citizen of Malaysia;

(f) the plaintiff is a criminal; G

(g) the plaintiff is a dishonest politician;

(h) the plaintiff wants Sabah to be controlled by foreigners;

(i) the plaintiff committed cheating; and H

(j) the plaintiff is responsible for the population boom and the presence of illegal foreigners in Sabah.

[7] By way of innuendo, the said statement means and/or bears the meaning that the plaintiff is an irresponsible person and/or untrustworthy politician who did not care for the well-being of the people of Sabah. I

[8] The plaintiff also pleaded that the defendant defamed him out of malice

as the defendant wanted to benefit politically in view of the then impending general elections.

[9] The defendant on the other hand, admitted to campaign against the Barisan Nasional ('BN') with particular reference to the cleaning of the electoral rolls to rid the same of 'phantom voters', and the unlawful issuance of Malaysian IC to foreigners.

[10] However, he denied causing the article in question to be published in the *Daily Express* and pleaded that the contents and/or meaning in the said article were different from the actual statement that was furnished to the reporter. He also said that the *Daily Express* omitted crucial words from the actual statement that he had furnished to the reporter of the *Daily Express*. But he also stated that he did not make any attempt to contact the reporter with a view to correct or put right how the impugned article was published in the said newspaper, despite the alleged crucial omissions.

[11] The defendant then pleaded the defences of justification, fair comment and qualified privilege. He also pleaded alternative meaning to the impugned article.

DECISION OF LEARNED HIGH COURT JUDGE

[12] Having considered the evidence as led before him, the learned High Court judge had, on 15 July 2014, allowed the plaintiff's claim and awarded the plaintiff the sum of RM100,000 being the general and aggravated damages. No exemplary damages awarded because the circumstances that would trigger the award for exemplary damages as outlined in the definitive case of *Rookes v Barnard* [1964] AC 1129 were not established by the plaintiff. The learned High Court judge also made a finding that there was no malice on the part of the defendant that had actuated the making and publishing of the defamatory article. The learned High Court judge also granted an injunction restraining the defendant from printing and publishing further the statements and/or similar libel on the plaintiff in any form or means whatsoever; and ordered that the defendant to pay the plaintiff costs of RM50,000.

[13] Aggrieved by the said decision, the defendant appealed against it to the Court of Appeal vide notice of appeal dated 11 August 2014.

[14] The plaintiff on the other hand, filed a notice of cross-appeal dated 16 October 2014 in respect of the learned High Court judge's findings that there was no malice on the part of the defendant in publishing the impugned article and against the award for damages of RM100,000 which is ought to be varied to a higher figure to include the exemplary damages. As such, two issues

were cross-appealed against by the plaintiff, namely on finding of no malice and non-awarding of exemplary damages.

THE APPEAL

[15] We had heard both learned counsel's oral submission before us. having considered all the cause papers and the records of appeal filed, we dismissed this appeal. We had also struck out the notice of cross-appeal lodged by the plaintiff after sustaining the preliminary objection raised by the defendant's learned counsel. For the purpose of this judgment, parties will be referred to as they appeared in the High Court. We now proffer the reasons for our decision.

[16] We will deal with the preliminary objection objecting to the cross-appeal first before dealing with the reasons for dismissing the main appeal.

[17] In respect of the plaintiff's notice of cross-appeal, the defendant raised a preliminary objection on the grounds that:

(a) it goes beyond what is permitted under r 8 of the Rules of the Court of Appeal 1994 ('the COA Rules') read with Form 2 of the COA Rules which permits variation and does not allow an appeal against the substantive finding of the court. If the plaintiff wants the decision to be reversed or set aside, the defendant ought to have filed a separate notice of appeal; and

(b) the plaintiff's notice of cross-appeal does not relate directly to the defendant's appeal, namely on the issue of non-award of exemplary damages and the issue of finding of absence of malice on the part of the appellant.

OUR FINDING ON THE PRELIMINARY OBJECTION

[18] In respect of the notice of cross-appeal by the plaintiff, we dismissed the cross-appeal on exemplary damages. We agreed with the learned counsel for the defendant that appeal was incompetent and that the ruling in the case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd* [2016] 5 MLJ 557; [2016] 8 CLJ 149 which affirmed the Court of Appeal's decision on the construction of rr 5 and 8 of the Rules of the Court of Appeal 1994, was in play. Here, the plaintiff was not happy with the denial by the High Court judge of his prayer for exemplary damages.

[19] To our mind, this involved a substantive finding by the learned High Court judge as he was clear in his view that the circumstances before him were not such that the *Rookes v Barnard*'s ruling had been fulfilled which would

otherwise justify him awarding exemplary award as prayed for by the plaintiff. Put in simple terms, Lord Devlin was of the view exemplary damages would be properly awarded whenever the court was satisfied that the defendant should be taught a lesson, by way of a penalty/punitive sum, so as to convey a message to him that it does not pay to commit a tort against the plaintiff. In the circumstances of this case, we agreed with the learned trial judge that there was no such evidence led by the plaintiff to even remotely suggest that the required threshold had been met so as to justify the learned trial judge to allow an award for exemplary damages against the defendant. It was noted that as early as 1881, the English court in the case of *Re Cavender's Trust* [1881] 16 Ch D 270 had stated that an appeal which does not affect the original appellant cannot be by way of a cross-appeal. It behoved the plaintiff to file in a separate appeal.

[20] From the factual matrix of this case, the defendant did not appeal on the matter of exemplary damages. In other words, the matter of exemplary damages issue was never intended to be in play within the purview of the notice of appeal of the defendant.

[21] With regard to the issue on malice, the defendant had not appealed against the finding by the learned trial judge that there was an absence of malice on the part of the defendant when he caused the impugned article to be published by the *Daily Express* newspaper. It must be borne in mind that it was on the plaintiff to prove that the defendant was actuated by malice when he embarked on this exercise. So, when the learned trial judge decided that there was no malice on the part of the defendant in relation to the defences of qualified privilege and fair comment, it amounted to a substantive ruling made against the plaintiff and therefore, if the plaintiff was aggrieved by it, he should have filed a separate notice of appeal accordingly. The defendant did not appeal against that ruling by the learned trial judge on the absence of malice, for obvious reason. So, it behoves upon the plaintiff to file a separate notice of appeal on what he regarded to be the adverse ruling on malice.

[22] There was, therefore, no proper and competent appeal before this court, in which the plaintiff's complaints pertaining to the exemplary damages and the issue of malice had been validly presented before us. As such, the plaintiff should have filed in a separate notice of appeal under the circumstances, so as to enable the ventilation of his grievances pertaining to the non-finding of malice and non-awarding of exemplary damages.

[23] As a result thereof, we agreed with the learned counsel for the defendant that there was no competent cross-appeal on both issues before us. Therefore, we had sustained the preliminary objection by learned counsel for the defendant.

[24] We now proceed to proffer the reasons as to why we had dismissed the defendant's appeal. A

[25] Learned counsel for the defendant had premised his appeal on the following points: B

(a) whether the said article as appeared in the 17 July 2011 *Daily Express* edition was published by the defendant;

(b) whether the article bears the defamatory meaning pleaded in the statement of claim; C

(c) whether the defendant had proven the truth of the said article in the meaning stated in the amended defence;

(d) whether the defendant had proven the truth of the said article in the meaning pleaded in the statement of claim; (alternative meaning) D

(e) plea of fair comment;

(f) defence of qualified privilege;

(g) appeal against the award of damages of RM100,000; and E

(h) costs.

[26] We propose to deal with the grounds raised by the defendant by taking the grounds listed above in turn. F

[27] In any trial involving defamation, one of the fundamental elements that has to be proven by the plaintiff is the fact that the impugned statement that was published is, in law, defamatory. In other words, such statement has the tendency to impute adverse and contemptuous view of right-thinking members of society against the plaintiff. Perhaps a reference to the speech by learned justice Mohd Azmi J (as he then was) in the case of *Syed Husin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 would be helpful to illustrate the point: G

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally. H

[28] Again, the *Halsbury's Laws of England*, has defined a defamatory statement as follows: I

> A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey

A an imputation on him disparaging or injurious to his office, profession, calling, trade or business.

[29] A statement, either in the written form or in the oral or spoken form, would constitute in law, a defamatory statement if it has the effect of lowering B the reputation or estimation of the plaintiff in the eyes of ordinary and reasonable members of society. The quintessential element of the tort of defamation has always been the protection of a person's reputation from being unjustly vilified, and it is actionable per se and damages would, in law, flow as a matter of course, once the tort is established against the defendant. C

[30] In this regard, we noted that the learned trial judge had applied the correct test as what a defamatory statement meant in law and applying the test to the evidence before him, he had come to the conclusion that the article that was impugned by the plaintiff was indeed defamatory against the plaintiff. At D p 40 of the records of appeal, Vol 1, the learned trial judge had stated as follows, as signifying his finding to the effect that the impugned article was defamatory:

> In my opinion, the natural and ordinary meaning of the article in question that would be understood by the ordinary reader of the *Daily Express* would be that the E plaintiff was involved in the heinous act of issuing identity cards to foreigners who were not entitled to them and had thereby committed a serious crime. My reasons are as follows. The article does not refer to a single instance of issuance of a blue identity card to a foreigner. The article refers to an 'exercise' involving the said act which means that the act was committed on a massive scale. The article also alludes to 'fraudulent identity cards' which means that those who benefited from the F issuance of identity cards were not legally entitled to them. The 'act' was also alleged to be criminal in nature as the defendant said in the article that he had lodged police reports and referred to the fact that Hassnar was detained under the Internal Security Act 1960 for his role in the said 'exercise'. Finally, the defendant posed the question whether the act is treasonous. Therefore, in my opinion, the article bears G the defamatory meaning that is pleaded in the statement of claim.

[31] Having perused through the evidence, we saw no reason to depart from the learned trial judge's finding on the issue.

H **[32]** Since it was established by the plaintiff that the article was defamatory of him, was there publication of the same by the defendant? At this juncture, it would be opportune to address the submission by learned counsel on that issue. Although there was publication of the defamatory statement, it was submitted before us that the defendant was not responsible for the publication of the I impugned article in the *Daily Express* newspaper, because according to him, the impugned article did not contain the *whole entire* statement that he had given to the journalist, Christopher Bernard Maskilone ('DW4'). DW4 was called to testify in the trial proceedings. In the examination-in-chief, DW4 testified that he had indeed omitted certain words from the original text of the statement

that the defendant had given to him. But when cross-examined by learned counsel for the plaintiff, DW4 agreed that the defendant never requested for any clarification from DW4 after the article was published in the *Daily Express* newspaper at any time pertaining to the said impugned article. In such a circumstance, we agreed with the learned trial judge that it was not open for the defendant to now deny responsibility for the consequences that may flow as a result of the publication in the *Daily Express* of the same.

[33] The law on publication in the context of the tort of defamation is, in fact, clear. It is this. For there to be defamation, there must first be established the factum of publication to at least a third party in respect of the impugned defamatory statement. A communication confined to the two parties, namely the speaker and the listener, can never amount to a defamation of the listener's reputation as there is no publication of the same to a third party. In the absence of a third party, no reputation can be in jeopardy of being tarnished. So, publication of the defamatory statement is an essential element to be established in the tort of defamation.

[34] We had looked at how the learned trial judge had dealt with this issue of publication in his grounds of judgment. We reproduce his finding like so:

> It is improbable that the defendant who is an educated person and an experienced politician would have kept quiet if it is true that his so-called 'actual' statement was distorted by the *Daily Express* to the extent that he did not agree with. It must be noted also that Christopher Bernard Maskilone did not produce the original statement that he received from the defendant. As pointed out by counsel for the plaintiff, the defendant had several opportunities to disavow the article in question but he did not. He did not respond to the two letters demanding an apology from the solicitors of the plaintiff. He could have replied saying his full article was not published. The plaintiff had also issued a press statement demanding an apology. The defendant could have demanded a correction from the Daily Express if it was true that he is not the author of the article in question or that he did not accept the amendments made to the original statement (see p 43 of the records of appeal — Vol 1).

[35] The learned trial judge concluded on the issue by saying:

> In my opinion, as the defendant was content to permit the article in question to remain in the public domain without any correction, it can be reasonably inferred that he caused it to be published or that the published article is the natural and probable consequence of the actual statement that he gave to Christopher Bernard Maskilone.

[36] The factual situation in this present appeal before us actually is materially similar to what happened in the case of *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22; [2000] 6 CLJ 433 where it was held that where 'a

defendant gives a press statement for publication, or in expectation that it would be published, he becomes responsible for the republished version even if it is an edited version' (see p 44 of the records of appeal — Vol 1).

[37] The learned trial judge saw the striking similarity on the publication issue that was before him. The defendant had tried to disassociate himself from anything to do with the published version of the statement which was given to DW4 a senior reporter of the *Daily Express*. Surely, the defendant expected that the statement he had given to DW4 would in all probabilities be published by the newspaper. Indeed, the statement was published but according to the defendant, it was published, as admitted by DW4, in an edited version. The published version did not publish all that was contained in the original statement which DW4 received from the defendant. Thus, the reference by the learned trial judge to the *DP Vijandran*'s case which to our minds, was entirely justified. There was evidence before the learned trial judge to come to that conclusion because the defendant had more than ample opportunities to contact DW4 in order to alert the latter of any incorrect contents of the published article. But the defendant had failed to do the same. In such a scenario, the law presumes that the defendant had embraced the article in all its contents to be entirely his and that it was his publication in as much as it was published by DW4 in the *Daily Express*. If the defendant had any concerns or reservations about the article at all, he is duty bound to contact DW4 and then have him make the necessary corrections pertaining to the contents of the published article. This the defendant did not do. He cannot now conveniently disown the published article although it was not in its original form and content.

[38] In the circumstances, we found no reason to depart from the learned trial judge's finding on publication. It was our considered view as well that the article was published by the defendant.

[39] As such, two essential facts, namely the article was defamatory against the plaintiff and that the defendant had published the same in the *Daily Express*, which were incumbent on the plaintiff to establish thus far, in order to prove his case of defamation against the defendant in this case, had been established successfully. That being the case, the burden then had shifted to the defendant to establish his defences, failing which liability would attach to him. As was alluded to earlier, we noted that the defendant had pleaded the defences of justification, qualified privilege and fair comment.

[40] Justification as a defence affords a complete exoneration from any liability for the defendant, although as a matter of fact and of law, the impugned statement was indeed defamatory. Justification connotes the truth of the statement. The rationale upon which this defence is founded is really

simple, namely the truth. Stating the truth can never be a wrong in law, though often a time, it may cause hurt to the plaintiff. Nothing can compromise a truth. A truth, however hurtful, once established, cannot be rebutted. Just like antidote is to venom, truth neutralizes falsehoods. For that reason, if a defendant were to publish for the whole world to hear, that the plaintiff is a rogue or a scoundrel, the truth of the same statement, once proven by the defendant, would provide a complete and full defence against any liability for defamation. In *Chiew Foo Hua v The Publisher Miri Daily News & Anor* [2000] MLJU 664; [2000] 8 CLJ 68, the court there had held as follows:

> In order to succeed in the defence of justification, the defendants must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. In order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts.

[41] Again, the law does not require that the defendant come up with the absolute truth pertaining to the whole of the impugned statement that has disparaged the plaintiff and put the latter in public odium or disrepute. It would suffice if the defendant is able to prove that the defamatory statement is in substance the truth. As such, there is no escaping for a defendant to prove the truth of the material part of the impugned statement that had injured the plaintiff. If he succeeds in doing so, then the publication of the statement, however defamatory, is justified and no liability sticks on him. In fact, under s 8 of the Defamation Act 1957 (Act 286) provides as follows:

> 8 Justification
>
> In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[42] To our minds, the operative words under that s 8 would be 'if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.' In other words, the sting of the defamatory remark that has materially injured the plaintiff must nevertheless be proven to be the truth by the defendant (see *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560).

[43] In this case, the sting in the published article was correctly identified by the learned trial judge, namely that the plaintiff was involved in the fraudulent issuance of ICs to foreigners and that it was a treasonous act. In such a circumstance, therefore it had become incumbent upon the defendant to prove

A that the plaintiff was actually involved in the fraudulent issuance of the blue ICs to foreigners.

[44] Apart from alleging that the plaintiff had been engaged in the issuance of the Malaysian blue ICs to undeserving foreigners, the defendants had failed to adduce the necessary evidence to establish the truth of that grave accusation which he had labelled as being treasonous on the part of the plaintiff. He had mentioned names such as Megat Junid Megat Ayub and Yahya Lampong as people with whom the plaintiff had colluded in this seemingly unholy enterprise, but he failed to call them to testify. The bulk of his allegation had come from one person by the name of Hassnar but this person, though admitted by the plaintiff as being one of his people, the plaintiff had maintained throughout that he had 'only requested my friends and my people including Hassnar to assist those qualified foreigners to apply and help fill forms for them'.

[45] In fact, the plaintiff had in his answer to question 22 of his witness statement had stated as follows:

> 22 Q: What is your response to the Amended Defence of the defendant that you were involved in the fraudulent issuance of Identity cards and that you asked Hassanar and Datuk Yahya Lampong to meet the late Dato Megat Junid?
>
> A: I was definitely not involved in the fraudulent issuance or Identity Cards. As stated many times, I only requested my friends and my people including Hassanar to assist those qualified foreigners to apply and help to fill forms for them. I myself never fill in any application forms. I cannot remember whether I arranged a meeting between Hassanar, Datuk Yahya Lampong and the late Dato Megat Junid. However, if I did, this is another proof that I have no power and Dato Megat Junid being in the Federal Cabinet had the power and authority to issue Identity Cards.

[46] It was clear that while the plaintiff had denied as well as explained his role in the alleged scheme by way of affirmative statement as could be seen in his answer to question 22, among others, there was no such affirmative evidence emanating from the defendant tending to prove the defendant's defamatory article against the plaintiff, on the balance of probabilities.

[47] In this instant case before us, we noted that the learned trial judge had come to the following decision, in relation to the defence of justification. It appeared in his grounds of decision, at p 52, records of appeal Vol 1, which we would now reproduce, like so:

> For all the above reasons, I find that the defendant had failed to prove the defence of justification on a balance of probabilities.

[48] Having perused through the evidence in the records of appeal, with

respect, we were of the considered view that the learned trial judge did not err when he had so decided the way he did. Was the impugned article the truth as to what it contained in relation to the plaintiff? The learned trial judge had answered that question in the negative and he gave his reasons for having concluded the way he did. Having scrutinised his reasons, we saw no reason to disagree with his conclusion, in that the article did not contain the truth, nor did it contain substantial truth of the matter which was injurious pertaining to the plaintiff, as envisaged under s 8 of the Defamation Act 1990.

[49] The learned trial judge found that the defendant had failed to avail himself to the benefits of this type of defence, ie justification, in this case. We had occasion to look at his grounds of judgement. We noted that the learned trial judge had appreciated the evidence of the various witnesses for both parties and he had found the evidence of the plaintiff to be consistent and reasonably credible when compared to those of the defendant's and his witness, especially that of Hassnar, whom the learned trial judge found to be suspect. We noted this to be a crucial finding of fact by the learned trial judge who had the distinct audio-visual advantage of observing the demeanour of the witnesses before coming to the conclusion that he did. At pp 31–32 of his grounds of judgement, we found the following finding on the defence of justification by the learned trial judge, where he had said as follows:

> For all the above reasons, I find that the defendant had failed to prove the defence of justification on a balance of probabilities.

[50] Again, having regard to the evidence as adduced before him, we were in unison in our view that the learned trial judge was correct in his conclusion when he ruled that the defence of justification was not established by the defendant.

[51] The defendant also contended that he had given an alternative meaning that could be derived from the impugned article. As was submitted by learned counsel for the defendant, this alternative meaning did not have the effect of defaming the plaintiff.

[52] Otherwise commonly referred to as the *Lucas-Box* defence after the name of the case *Lucas-Box v News Group Newspapers Ltd* [1986] 1 All ER 177; *Polly Peck (Holdings) plc and others v Trelford and others* [1986] 2 All ER 84, *Viscount De L'Isle v Times Newspapers Ltd* [1987] 3 All ER 499, it is an accepted principle that the plaintiff cannot restrict the defendant, in the extent of his defence of justification, as to what the meaning of the impugned statement was, according to the defendant. But having said that, the authorities have illustrated that it is of utmost importance that the *Lucas-Box* particulars should set out the meaning expressly and not leave it to the reader to do his best to deduce and extract from a series of particulars what must be the meaning or

meanings which the defendant is apparently seeking to justify. This is to ensure that the plaintiff is not embarrassed or prejudiced in preparing his case in order to rebut the defendant's assertion as to the alternative meaning to that given by the plaintiff.

[53] After viewing the pleadings of the defendant, we were in agreement with the learned trial judge that the defendant had correctly rejected the alternative meaning that was sought to be advocated by the defendant as justifying his impugned article that was published that had impacted adversely on the plaintiff's reputation and estimation in the eyes of right thinking members of his community.

ON QUALIFIED PRIVILEGE

[54] The defendant had also complained in his appeal that the learned trial judge had erred in law and in fact when he ruled that the defendant had failed to establish defence of qualified privilege.

[55] Now, what is qualified privilege as a defence in a defamation suit? Essentially, it is a defence that is available to a defendant whereby the defendant as the person communicating the defamatory statement usually has a legal, moral or social duty to make it and the recipient has a corresponding interest in receiving it.

[56] Whether an impugned statement qualify for protection under this defence of qualified privilege would depend on the surrounding circumstances of the particular case. The essential elements that must however be present are a duty on the part of the defendant to state it and the corresponding duty on the part of the public to whom it was communicated via the publication, to receive it.

[57] The learned trial judge had stated the correct postulation of the law on qualified privilege. We also agreed with his observation, having cited a slew of case authorities in that, unlike the defence of fair comment, the defence of qualified privilege provides a wider protection as the defendant need not prove that the underlying defamatory imputation of fact was true. The defamatory imputation may be false. However, the defendant is only required to prove that the libellous statement was made pursuant to an interest or of a duty, legal, social, or moral and that the recipient of the statement had a corresponding duty to receive it. Clearly, the rationale for the defence of qualified privilege is not so much what was published was necessarily the truth, but rather, was driven by what needed to be informed, which the public would need to know.

[58] Reverting back to the grounds of judgment of the learned trial judge,

we found his finding on the defence of qualified privilege at p 59 of the records of appeal and we reproduce the relevant portion as follows:

> In the instant case, the allegation against the plaintiff in the published article was that he was involved in the fraudulent issuance of the identity cards. The defendant is a politician and a surgeon. The intended recipient of the statement of the defendant is the general public. However, the public has no corresponding duty to receive this communication because the proper authority to investigate such allegations against the plaintiff is governmental or public bodies such as the recently constituted Royal Commission of Inquiry on the Sabah illegal immigrants. Therefore, the defendant cannot rely on the traditional defence of qualified privilege as discussed in *Adam v Ward* as he cannot demonstrate that that general public has a corresponding duty to receive the defamatory communication in question.

[59] In fact, the learned trial judge even went a step further to consider whether the defendant could still find refuge under the *extended* qualified privilege as enunciated in the Australian High Court case of *Lange v Australian Broadcasting Corp* [1997] 145 ALR 96 based upon the concept of 'reasonableness of conduct' of the defendant, in cases involving government or political matters. In the *Lange* case the test of reasonableness of conduct it was stated by the High Court of Australia that:

> reasonableness of conduct is an element for the judge to consider only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege.

[60] And what would amount to whether the making of a publication of a publication was reasonable must depend on the circumstances of the case. The Australian apex justices ventured to add:

> But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

[61] Having considered the defendant's learned counsel's submissions on why the extended qualified privilege should apply to exonerate the defendant in this case, the learned trial judge had at p 62 of the records of appeal concluded as follows:

> In my opinion, the defendant cannot avail himself of the extended qualified

privilege defence afforded by *Lange v Australian Broadcasting Corporation*. The defendant must show that he had acted 'reasonably' in all the circumstances of this case. I find that he has failed to do so for the following reasons. As I said earlier, he had no grounds for believing that the imputations in the published article were true. His main source of information was Hassnar who gave evidence in the *Likas Election Petition* trial. However, the court did not find that the plaintiff was involved in the fraudulent issuance of identity cards. The evidence of Hassnar can be presumed to be in the public domain as it was an open court hearing. Therefore, the public had already been informed of this allegation at the time of the trial. The defendant did not bother to say in the published article that the election judge did not make a finding that the plaintiff was involved in the fraudulent issuance of identity cards. Therefore, the repetition of the unproven allegations of Hassnar which are highly defamatory a dozen years later cannot be considered to be conduct that is reasonable in all the circumstances. I am mindful that the discussion in the newspapers preceding the publication of the article in question was about fraudulent issuance of identity cards and that the plaintiff had defended the National Registration Department. However, the plaintiff never said that he supported or was involved in the fraudulent or unlawful issuance of identity cards to those who are not eligible. He only said that the Federal Government had the power to issue identity cards. Furthermore, the defendant never sought the response of the plaintiff before going to the press.

[62] Looking at the circumstances in this case, with respect, we agreed with the learned trial judge that there was no occasion that could have entitled the defendant to find refuge under qualified privilege when he caused the impugned statement to be published in the *New Express* newspaper that fateful Sunday.

[63] As such, we could find no error on the part of the learned trial judge when he concluded that the defendant had failed in his defence of qualified privilege, including extended qualified privilege. In light of the evidence before him, and having looked at the records of appeal before us, suffice for us to say that the learned trial judge had not erred in the manner in which he had come to the conclusion that the defence of qualified privilege, including extended qualified privilege, must fail.

[64] The defendant had also submitted before us that the learned trial judge had erred in concluding the he had failed in his defence of fair comment. Fair comment as a defence in a defamation suit may be explained as follows: The defense to an action of defamation, that the statement in question was based on the speaker's or writer's honest and impartial observation or opinion about a matter or subject of public concern or interest. The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be

legitimately interested in, or concerned about, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.

[65] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not to have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved. However, fair in this context, does not mean reasonable, but rather, it signifies the absence of malice.The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.

[66] In this case, the learned trial judge deliberated on this defence in some detail as could be seen at pp 52–56 in his grounds of judgment and he had concluded that the article related to statements of facts and not of opinion. The learned trial judge expressed his view on the issue of fair comment at p 57 in the records of appeal, like so:

> The question to ask is whether the defendant could have been said to have honestly held the opinion or belief that the plaintiff was involved in the fraudulent issuance of identity cards and that he was guilty of treason. In my opinion, this question should be answered in the negative and my reasons are as follows. It is the defendant's own evidence that he and the plaintiff were petitioners in the *Likas Election Petition* trial. Despite the evidence of Hassnar and Mutalib MD, the Election Court did not make any finding against the plaintiff to the effect that he was involved in the fraudulent issuance of identity cards. The defendant also admitted that he was aware that the plaintiff had no power to issue identity cards and that he never witnessed him doing so. Thus, the comment of the defendant in asking the plaintiff to clear his name cannot be said to be 'fair' or 'honest. For the above reasons, I find that the defence of fair comment fails.

[67] We agreed with his conclusion on the defence of fair comment. There was no reason to interfere in any way with his conclusion as such.

[68] So the learned trial judge had rejected all the pleaded defences of the defendant. But he did not stop there. He had gone on to make a finding that there was no malice on the part of the defendant in publishing the impugned article. He had advanced his reasons for doing so as can be seen at pp 49–50 of his grounds of judgment. This had apparently aggrieved the plaintiff. It was part of his pleaded case that there was malice on the part of the defendant that had actuated his publication of the impugned article. However, as there was no separate notice of appeal filed by the plaintiff against that adverse ruling by the

learned trial judge, we had ruled that there was no competent appeal before us on the issue of malice and on exemplary damages which also suffered from the same defect pertaining to failure to file a separate notice of appeal, as envisaged by the *Leisure Farm* decision.

ON DAMAGES

[69] Although we had struck out the notice of cross-appeal on account of it being incompetent before us, we did however hear the submissions on general as well as aggravated damages by both learned counsel. Having referred to the cited authorities, we were with the plaintiff's learned counsel that the damages that were awarded as a global sum of RM100,000 covering both heads of general and aggravated damages, was in no manner excessive or unreasonable, bearing in mind, among others, the reputation of the plaintiff among the local community. His standing in the eyes of the local community had been tarnished by the defamatory article attributable to the defendant and that damage needed to be sufficiently repaired. An unjust vilification needed to be vindicated, and vindicated fairly. It is trite that a compensatory award ought not to be resorted to in order to unfairly enrich its recipient. While an amount in exactitude is invariably a near impossibility to achieve, nevertheless, the compensation amount awarded ought to reflect the closest that the court can quantify in order to bring back the plaintiff as near as possible to a position before the injustice was caused to him by the defendant. To our minds, the learned trial judge did not err in awarding the plaintiff the sum of RM100,000 that was handed down as general as well as aggravated damages. We saw no reason to depart from the figure that had been awarded to the plaintiff. We found the figure to be fair and just compensation, in the circumstances of this case. It was also within the range of damages looking at the trend on the awarding of such damages in like cases.

[70] The threshold which warrants an appellate interference is clear. It is not to be triggered at the slightest semblance of error on the face of record as having been committed by the learned trial judge. Neither would it be triggered merely on account that the appeal judges would have come to a different finding of facts from those arrived at by the learned trial judge. Rather, the test to be applied was stated in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where it must be shown to the satisfaction of the appeal court that the trial judge had been plainly wrong in coming to the decision which he did. With respect, we found that the learned High Court judge had not been plainly wrong nor did he commit any appealable error in having so decided the way he did. We agreed that the article contained a defamatory meaning against the plaintiff. We also could find no valid reason to depart from his findings that the defences sought to be erected by the defendant were, with respect, devoid of merits. We also had no cogent reasons to disturb the global quantum of damages that was awarded for general

as well as aggravated damages, as we found it to be reasonable and fair in the circumstances.

CONCLUSION

[71] In the upshot, we had dismissed the main appeal by the defendant. Earlier, we had struck out/dismissed the notice of cross-appeal filed by the plaintiff as it was incompetent. We awarded costs of RM30,000 to the plaintiff, subject to the payment of allocator fees. We therefore, had affirmed the decision of learned High Court judge. We also had ordered that the deposit be refunded to the defendant who was the appellant in this appeal. We had so ordered accordingly.

Order accordingly.

Reported by Ashok Kumar